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NO. 314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

KINNEAR-WEED CORPORATION, *Petitioner*

v.

HUMBLE OIL AND REFINING COMPANY,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Kinnear-Weed Corporation, Petitioner prays that this Court grant rehearing of its order of October 23, 1961, denying the petition for writ of certiorari filed and docketed August 12, 1961, and that a writ of certiorari issue to review all judgments, orders, and decrees for Respondent and against Petitioner in the above-entitled case as prayed for in the petition filed August 12, 1961 herein.

QUESTIONS PRESENTED

Petitioner reasserts its petition in all respects filed herein, August 12, 1961, and, in addition thereto, under Rule 58 of the rules of this Court presents and requests this Court to review the following substantial grounds available to petitioner although not previously presented to show to this Court that all judgments, orders, and decrees in this case for Respondent and against Petitioner are illegal, clearly erroneous, unjust and should be reversed and appropriate relief granted to your petitioner as prayed for herein and said Petition and to which Petitioner may be entitled.

1.

This is a patent case involving—"a pair (two) small holes"—in a well drilling bit. It is a legal question whether or not—a pair (two) small upper holes"—are included in the patent "*claims*" of Petitioner's Patent Re 23,416 to determine validity, patent infringement, and related charges involving said patent.

After more than eight (8) years of continuous litigation the Court of Appeals has finally reversed the District Court's judgment which had held Petitioner's patent "invalid and void". The undisputed and uncontested evidence in this case shows that Respondent, through its agents and engineers, illegally filed U. S. Applications for patents with false oaths on the subject-matter of "jet bits" and "jet drilling" with full knowledge and use of Petitioner's "jet bit" inventions disclosed and "*claimed*" in its now adjudged valid patent. The expertness of the Patent Office had held and cited Petitioner's patent as prior invention over Respondent's said illegal applications for patent on the subject-matter of "jet bits" and "jet drilling". The Supreme Court has held, that the administrative agency (patent office) is expected to have developed an expertness in its specific field beyond what may be expected from the courts wherein adjudications range the whole field of human controversies (WILLIAMS vs. UNITED SHOE MACH. CORP., 121 F2d 273, CCA 6 (1941), aff'd. 316 U.S. 364, 86 LEd 1537 (1942).

There is no question that Petitioner's Patent discloses and claims the inventions of "jet bits" by which "jet drilling" is performed. The total evidence of both Respondent and Petitioner in this case agree that "jet bits" have been universally adopted and have "REVOLUTIONIZED" the oil and gas well drilling industry because the "jet bits" drill up to five (5) times faster than all prior art bits and have saved

staggering sums in the drilling of wells by the well drilling industry of which the public is the recipient in the cheapness and adequate supply of petroleum products. In such a highly competitive industry some one had to invent the "jet bit" because of its importance and Petitioner's Kinnear patent is the only patent issued by the Patent Office claiming the inventions in "jet bits". The Court of Appeals in reversing the District Court as a matter of law has held the Petitioner's patent is different than and has overcome all prior art bits cited by Respondent as anticipation of Petitioner's patent. The Court of Appeals reversed the District Court on its judgment that Petitioner's patent was "invalid and void" and by so doing the Court of Appeals reversed all of the Findings of Fact, Conclusions of Law and judgment pertaining to the District Court's incorrect interpretation of Petitioner's patent including patent infringement because the District Court could not correctly rule on patent infringement since the Court of Appeals has ruled that the District Court did not correctly interpret Petitioner's patent. Should the Supreme Court allow and permit the Court of Appeals to incorrectly affirm the judgment of the District Court which decreed

> "2. That U. S. Patent No. Re. 23,416 has not been infringed by defendant, Humble Oil & Refining Company;"

where the Court of Appeals reversed the judgment of the District Court on its incorrect interpretation of Petitioner's patent that said patent was "invalid and void"?

II.

There is a conflict within the opinions of the Court of Appeals which held

> "We agree with the District Court that appellee has not infringed appellant's patent." (259 F.2d 402, Per Curiam Opinion 266 F.2d 352)

And, the Court of Appeals made a conflicting opinion quoted below with its opinion above upon the same question of infringement of Petitioner's patents and cannot base its judgment or affirm the judgment of the District Court upon said conflicts of its opinions. A portion of the opinion quoted below is in conflict with the opinion quoted above.

> "Further, we agree with the disposition by the District Court of the claims *other than for patent infringement.*" (259 F2d 402).

The Court of Appeals cannot "*agree*" with the District Court in one part of its opinion and "disagree" with the District Court in another part of its opinion on the question of patent infringement, that is, "appellee has not infringed appellant's patent", and, hold its judgment and affirm the judgment of the District Court for Respondent and against Petitioner. This is a conflict within the Opinion of the Court of Appeals which nullifies its judgment and the Supreme Court should resolve this conflict and reverse the judgment of the Court of Appeals as a matter of law. The Court of Appeals *disagreeing* with the disposition of the District Court on the claim of patent infringement cannot affirm the District Court's disposition of the claim of patent infringement upon which the judgment of the District Court is based, and then affirm the judgment of the District Court. It is an error as a matter of law for the Court of Appeals to affirm the judgment of the District Court with which it "*disagrees*". Should the Supreme Court allow the illegal judgment for Respondent and against Petitioner to stand where there is conflict within the opinion of the Court of Appeals upon the question of infringement of petitioner's patents? Should the Supreme Court allow the Court of Appeals to illegally affirm the judgment of the District Court with which it disagrees on the disposition of the claim of patent infrngement?

III.

Petitioner has been denied the right to have the fact finding body (Judge or Jury) weigh the evidence and inferences and to give petitioner the benefit of doubts which the fact finding body might give petitioner had the Trial Judge known or correctly ascertained petitioner's patent was a valid patent, which the Circuit Court determined it to be by its memorandum opinion of May 17, 1961, wherein the Circuit Court ruled "that the judgment of the District Court in this cause be, and the same is hereby modified by striking therefrom that part which declares that U. S. Patent No. Re 23,416 is invalid and void, and, as so modified that said judgment be, and it is hereby, affirmed." (Petition for certiorari, pp. 141-2).

Thus the Circuit Court struck down the judgment of the Trial Court that the patent was "invalid and void".

The Trial Court in its finding of fact No. 3, clearly pointed out that the validity of the patent was inextricably involved with the questions of breach of confidential relationship, unfair competition, patent infringement, and violation of Federal and Texas Anti-trust law.

The finding No. 3 reads:

> "Plaintiff charges defendant with breach of a confidential relationship, unfair competition, patent infringement and violation of the Federal and Texas Anti-trust laws. All these claims involved, and are inextrically connected with, the above mentioned two Kinnear patents, Nos. 2,380,112 and Re 23,416."

Since the questions involved are inextricably connected and involved with the question of the validity of the patent it is obvious that had the trial Court known, or determined said patent was valid, the trial court might and petitioner could, in all reasonableness expect the trial court to give more credence to petitioners evidence and expert opinions

and inferences to be drawn therefrom, in which event he could have in the light of the validity of the patent, reasonably cast the doubts to the side of petitioner, and the judgment would have been in favor of petitioner.

By refusing to reverse the whole cause for determination of the faces in the light of the validity of the patent petitioner is denied the right to have the benefit of the judgment of the trial judge when weighing the evidence in the light of the validity of the patent.

IV.

The trial court's judgment was affirmed even though it was based on findings made under a misapprehension of the law applicable thereto, on the basis that there was no infringement. The trial court found that petitioner's patent was anticipated by some approximately fifty-eight (58) prior art patents and publications. (See finding 76). The Court of appeals' opinion, last two (2) pages (Petition for certiorari pp. 71-72), sets out this finding and in the next to the last paragraph says that the two smaller ducts—not claimed as part of petitioners patent—are not excluded by petitioner's claims, and "So construed, these two smaller ducts are a part of the combination in which appellant's drill was expected to operate." Then the very next conclusion of the Court of Appeals followed—"We agree with the District Court that appellant (appellee) has not infringed appellee's (appellant's) patent."

Then the Court of Appeals in its last paragraph stated that "The issues are so far flung and broadly drawn, that we have not satisfied ourselves as to the validity of the claims limited to the form of combination bit shown in the patent."

On rehearing the Court of Appeals was convinced that its holding that anticipation by the prior art was not shown by the exhibiton of the two smaller holes, which were not

even claimed to be patentable, and ruled: "We do not intend to read into the claims of appellant's patents, as limitations of that patent any part of the drawings or of the specifications not expressed or necessarily referred to by implication in those claims."

Thus, the Trial Court like the Court of Appeals on original opinion was of the belief that petitioner's claims were anticipated by the prior art because the drawing—not claims—show the two small upper holes. The principal reference upon which Respondent relied to anticipate the inventions contained in the "*claims*" of Petitioner's patent Re 23,416 amongst the numerous prior art bits cited by Respondent was the Patent to Hughes 1,204,157 (See Finding 76). Finding 87 in comparing Hughes to Re 23,416 exemplified the Hughes Patent and found Hughes to contain as "essential elements"—a pair (two) small upper holes or ducts—which said District Court held were also disclosed and "*claimed*" in the "*claims*" in the Kinnear Re 23,416 to show there could be no infringement since Hughes anticipated Kinnear Re 23,416, and, the pertinent portion of finding 87 reads:

> "87. Hughes Patent No. 1,204,157, granted in 1916, discloses a drilling bit ***** The bit is provided with two pairs of water courses, *one pair* (two smaller upper holes or ducts of Re 23,416) directing streams of drilling fluid onto the tops of the outer roller cutters, ***** Therefore, the Hughes patent discloses all of the *essential elements* arranged in the same relation and performing the same functions as the bit disclosed and *claimed* in the Kinnear Patent No. Re. 23,416."

The Court of Appeals followed this reasoning of the Trial Court in its original opinion and ruled Re 23,416 was both invalid and non-infringed by Respondent by stating—"So construed, these two smaller ducts are a part of the combination in which appellant's drill was expected to operate".

The Court of Appeals later found it was in error and corrected its original opinion on rehearing by ruling—"We do not intend to read into the claims of Appellant's patents, as limitations of that patent any part of the drawings or of the specifications not expressed or necessarily referred to by implication in those claims". The Court of Appeals stated in its original opinion which it did not change that—"Appellant emphasizes that none of the *claims* of the patent (Re. 23,416) include these two smaller ducts. *That is true.*"—so none of the invalidating patents or findings on infringement of the *claims* of Re 23,416 have been correctly interpreted by the Trial Court. Its mis-intepretation of said *claims* as compared to the accused infringing bits still stands. The Court of Appeals corrected its misinterpretation but unless the Cause is reversed the Trial Court will never get a chance to reverse its erroneous belief that the two upper small holes constituted part of the "*claims*" and as such was anticipated by the prior art, and correct its enoneous belief that the patent "*claims*" are not infringed.

The above quotation clearly points out the incorrect interpretation placed by the Trial Court upon the—two small upper holes or ducts—as being an "essential element" included in the combination of parts contained in all of the "*claims*" of Re 23,416 and upon which the Trial Court concluded that none of the accused infringing bits could infringe said "*claims*" of Re 23,416.

A correct interpretation of the "*claims*" must be had to determine the question of patent infringement as the "*claims*" are the part of a patent that are infringed. A correct interpretation of the "*claims*" without the—"pair (two) smaller upper holes; called ducts or water courses"—makes out a clear case of patent infringement against the accused infringing bits made and used by Respondent, and, the District Court should have so held.

Thus, the Trial Court in arriving at his judgment applied

the incorrect rule of law—the validity of the patent being a law question.

The holding by the Court of appeals is similar to the holding where the issue is defendant's negligence and the Trial Court might rule that "Defendant is not negligent and therefore plaintiff is not entitled to recover"; and the Appellate Court would rule that the Trial Court's finding is modified by striking therefrom that part which declares, "Defendant is not negligent", and as so modified is affirmed.

Thus, when the Trial Court, under the holdings of this Court, was required to determine as a matter of law whether petitioners patent was valid, made an incorrect adjudication of the question of validity and erroneously determined that petitioner's patent was invalid and void, the die was cast. The Rubicon had been crossed—there was no turning back—the next conclusion was inevitable—it followed as the night, the day, that there was no infringement—How could there be—there was no patent to infringe!

The erroneous conclusion by the Trial Court that petitioners patent was invalid forced the further conclusion of no infringement.

Now that the Court of Appeals has passed on the question of validity of petitioner's patent and has struck down the Trial Court's finding of invalidity it likewise, should have struck down the finding of non-infringement because non-infringement was the inevitable result of the finding of invalidity, and the Court should have reversed this cause for retrial in the light of the validity of the patent.

Petitioner is entitled to a new trial before a Court which has the benefit of the knowledge that petitioner's patent is "not invalid and void"; and who, therefore, realizes that he is not "forced" to find non-infringement.

On new trial the Trial Court with the knowledge of the validity of the patent can and will weigh the evidence, ob-

serve the witnesses, and evaluate the prior art in view of the Court of Appeals' holding on rehearing that, "we do not intend to read into the claims of appellant's patents, as limitations of that patent any part of the drawings or the specifications not expressed or necessarily referred to by implication in those claims."

Only by a new trial can petitioners rights and claims be fairly evaluated and justice be administered by rightly dividing the word of truth, that petitioner's patent is valid—that infringement may or may not exist, but it will not be a foregone conclusion until all the evidence is in and weighed under correct rules of Law.

The Trial Court having tried this cause on an incorrect theory—that the patent was invalid—did not give this petitioner a trial according to law—but rather a trial according to a mis-interpretation of the Law. For instance, the same as if the Trial Court had held there was no infringement shown because petitioner did not prove respondent negligent in what it did and therefore, no infringement was proved.

Judgment cast in error and ignorance is no less onerous than judgment cast in venality and vindictiveness, though both are a travesty on justice.

A new trial would seem to be in order if justice is to be given a fair opportunity to operate under, and within the realm of, correct applicable rules and theories of patent law.

V.

If the Court of Appeals' holding in its corrected judgment that the District Court's finding of invalidity should be modified "by striking therefrom that part which declares U. S. Patent No. Re. 23,416 is invalid and void" is not a holding by the Court of Appeals that petitioner's patent is valid, then the Court of Appeals committed prejudicial error for this Court has ruled that in patent cases this Court must determine whether the patent is valid.

We believe the Court of Appeals in its corrected judgment held petitioner's patent valid but if it did not so hold then it certainly did not hold it invalid.

Therefore, if the Court of Appeals' opinion is to be construed as not determining the validity of the patent this cause should be reversed and a determination of that question made. See GREAT ATLANTIC & PACIFIC TEA CO. v SUPERMARKET EQUIPMENT CORP., 340 U.S. 147, 158 (95 L.Ed. 163) at pages 154 and 156.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

I.

The Court of Appeals reversed the judgment of the District Court which held petitioner's patents "invalid and void". The District Court did not understand that the patent contained invention as evidenced by the Court's holding said patents "invalid and void". The Court of Appeals reversal of the District Court's holding demonstrates that the District Court did not correctly interpret petitioner's patents. In reversing, the Court of Appeals necessarily reversed all findings of fact, conclusions of law and judgment of the District Court in all respects pertaining to petitioner's patents including the erroneous conclusion of invalidity of said patents. The Court of Appeals thereby committed grievous prejudicial error in affirming the judgement of the District Court that respondent has not infringed petitioner's patents. Reversal of the District Court's erroneous opinion that the patent was invalid and void would, it seems, necessarily call for a reversal of the District Court's holding of non-infringement, since the holding of non-infringement would have to follow a holding of invalidity; since, if there is no valid patent there certainly could be no infringement. Therefore, a new trial should be granted and the facts weighed in the light of validity of the patent.

II.

The Court of Appeals in its Supplemental opinion and corrected judgment dated May 17, 1961, reversed the judgment of the District Court which held Petitioner's U. S. Patent No. Re. 23,416 invalid and void", and by so doing, the Court of Appeals reversed and invalidated the "entire" judgment of the District Court due to the fact that the District Court misinterpreted the claims of petitioner's patents as not containing invention and the Court of Appeals is in error because the District Court based its entire findings of fact, conclusions of law and judgment that "all" of petitioner's claims charged against respondent "involved, *and are inextricably connected with the two Kunican Patents* 2,380,112 or reissue thereof Re. 23,416 as per finding of fact 3 of the District Court. The Court of Appeals as a matter of law is in error in its modified corrected judgment holding the remaining portion of the judgment of the District Court affirmed because the Court of Appeals invalidated all of the Findings of Fact, Conclusions of Law, and Judgment of the District Court which the District Court found in Finding 3 to be involved and inextricably connected with petitioner's patents. The Court of Appeals in its modified judgment cannot affirm the remaining portion of said judgment of the District Court because said remaining portion of said judgment is based *"solely"* upon the District Court's incorrect interpretation of petitioner's patents, therefore, the Court of Appeals cannot legally affirm the remaining portion of said judgment which is based upon the findings of fact and conclusions of law of the District Court that the Court of Appeals invalidated and reversed by striking from the District Court's judgment that part which held petitioner's patents "invalid and void".

III.

The Court of Appeals, if its holding is to be construed

is not passing upon the validity of petitioner's patent and holding it valid, when it struck down the Trial Court's finding of invalidity then the Court of Appeals committed serious prejudicial error in not determining whether petitioner's patent is valid and failed and refused to follow this the Supreme Court's rule that validity must be determined. For this error this cause should be reversed and a new trial granted.

IV

The Court of Appeals cannot agree with the District Court that respondent has not infringed petitioner's patents in one part of its opinion and disagree with the District Court on the disposition of petitioner's claim of patent infringement in another part of its opinion. This is a conflict within the opinion of the Court of Appeals and will not sustain the judgment of the Court of Appeals for respondent and against petitioner that respondent "has not infringed petitioner's patents", and further, the Court of Appeals is in error as a matter of law in affirming the judgment of the District Court with which it disagrees on the claim of patent infringement because the opinion of the Court of Appeals in disagreeing stated.

> "Further, *we agree* with the disposition by the District Court of the claims *other than for patent infringement.*"

This is a holding of infringement. The Court had held the District Court in error in its holding of invalidity and by the above quoted holding of the Court of Appeals the Court of Appeals says, in effect that it disagrees with the District Court's holding that there was no infringement. Therefore, the Court of Appeals after reversing the District Court's holding of invalidity and disagreeing with the District Court's finding of non-infringement should have reversed for trial rather than affirm, and in failing to do so committed grievous prejudicial error.

CONCLUSION AND PRAYER

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit, and that this cause be reversed for trial and for such further relief, either in law or equity, to which petitioner's may be entitled.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, William E. Kinnear, Counsel for Kinnear-Weed Corporation, petitioner in this above entitled case, hereby certify that the foregoing "PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI" is presented in good faith and not for delay and is

restricted to grounds specified in Rule 38 of the rules of this Court.

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PROOF OF SERVICE

I, William L. Kinnear, Counsel for Kinnear Weed Corporation, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 15th day of November, 1961, I served copies of the foregoing "PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI" by mailing the required copies in duly addressed envelope by U. S. Mail, postage prepaid to Mr. Walter B. Morgan, Esq., Counsel for Respondent, Post Office Box 2180, Houston, Texas.

DATED: November 15th, 1961

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